

continuous disclosure in any of its individual enforcement actions. As explained in testimony before a Congressional subcommittee two years ago, the Commission believes that the frequency and type of disclosures it has required have been adequate to avoid deception.¹ Of course, if evidence in a particular case showed that intermittent disclosures were inadequate, the Commission would consider additional remedies. Likewise, the Commission would also consider any evidence showing that different types of disclosures were necessary.

The question of how much disclosure is necessary to avoid deception in any particular case is one on which the Commission could benefit from additional empirical data. Because infomercials are becoming more widely used, it is reasonable to expect that consumers' understanding of them will continue to change over time. In fact, consumers may be more likely to recognize the commercial nature of an infomercial now than when they first came into use. I would encourage the industry to help the Commission keep abreast of changes in consumer understanding in this area through objective, empirical evaluations. The greater our knowledge of how consumers interpret advertisements, the better we are able to apply principles that are sufficient to alleviate deception without being unduly burdensome.

¹Statement of the Federal Trade Commission before the Subcommittee on Exports, Tourism, and Special Problems of the House Committee on Small Business, May 18, 1990, p.15.

Most of the Commission's cases involving infomercials have concerned more than just the format issue. In fact, only one of our eleven public cases, some of which are still pending, has been based solely on charges that the format was deceptive. All of the others included charges that claims contained in the commercials were deceptive or unsubstantiated. In three of our cases, the format of the infomercial was not even challenged, and our allegations were limited to deceptive claims about the advertised product.

As you can see, the Commission's treatment of infomercials reflects the view that infomercials are a legitimate, beneficial form of commercial speech, which is subject to the same rules for truthful advertising that apply to other forms of advertising. As long as the claims within the infomercial are truthful and not misleading, and as long as the format itself is not misleading, infomercials can serve many useful purposes.

Liability of Various Parties

I would now like to turn to another set of issues that arise in the context of the Commission's review of advertisements -- what parties are liable for the claims we find to be deceptive? As a basic rule, anyone who is responsible for creating and disseminating to the public a deceptive claim may be held liable for that claim. Manufacturers, of course, who may be the initial source of claims about product attributes, will be liable for any

misleading or unsubstantiated claims that they make directly or pass on to others in the distribution system. Questions arise, however, when a party asserts that it was merely repeating the claims of someone else. For example, what is the duty of an advertising agency? In an infomercial, will the program's host be held accountable for deceptive claims during the show? These and other questions are answered, again, the same way in the infomercial area, as they are with respect to any advertisement. Let me give you a thumbnail sketch of some of the principles we follow when imposing liability.

Advertising Agencies and Media Buyers

One primary role in the infomercial world is played by the advertising agencies. The Commission has on occasion found advertising agencies liable for their involvement in the creation of ads that the Commission alleged to be deceptive. Most recently, the Commission charged the agency that created Volvo's "Monster Truck" ads for its participation in that campaign. In another recent action, the Commission charged the ad agency for a toy company with misrepresentations in an ad depicting a ballerina doll that appeared to be able to dance by itself, when the doll actually needed a helping hand to perform its pirouettes. I believe these cases are illustrative of the Commission's standard. The primary factor we consider in such cases is the extent to which the agency actually participated in

the deception, and this inquiry includes whether the agency knew or had reason to know of the deception.

These two cases are also examples of Commission actions with respect to product demonstrations. Essentially, a product demonstration must accurately depict what the product can do. Those in the production end of commercials should be particularly cautious in this area to ensure that their depiction on camera of a product's capabilities is not materially different from the way the product performs in reality.

In some cases, an agency may have no role in creating the ad, but may serve only as a media buyer for the infomercial. To my knowledge, the Commission has never found a party liable if their only role was to purchase media time for an ad. Of course, to the extent that a party is responsible for reviewing ads, or facilitating the dissemination of ads known to be deceptive, such factors would weigh in favor of liability. In addition, depending upon the facts and circumstances involved, companies that have a financial interest in the product are more likely to be held accountable.

The Program's Host

Another role, unique to the infomercial area, is that of the host of the program. The Commission has in one case, charged a show's host with making deceptive claims about the nature of the

infomercial, and about the product being offered. In such cases, the Commission examines the degree of involvement by the party in facilitating the alleged deception. The Commission will consider such factors as whether the host had a financial interest in the product, and whether the host had any role in creating or editing the script for the program.

Celebrities, Experts, and Consumer Testimonials

Infomercials, like other ads, often use celebrities, experts, or consumer testimonials to promote a product. In some older cases, not involving infomercials, the Commission has brought action against celebrities for their role in advertisements. In such cases, the Commission considers whether the celebrity is making a consumer testimonial, as a user of the product, or appears to be an expert, rather than merely an actor being paid for promotional purposes. The Commission also takes into account whether the celebrity has any financial interest in the company or the product.

Expert and consumer testimonials may have the potential to create deceptive impressions if they do not accurately reflect the true opinions of those persons. Persons who are presented as "experts" are likely to be perceived more credibly by consumers. Accordingly, not only should that person actually be expert, but their opinions should be based on an expert evaluation or test of the product, using appropriate procedures. Experts can be

directly liable for any deceptive claims they make about the product.

In the case of consumer testimonials, the Commission has in a variety of advertising cases charged that testimonials given by consumers were deceptive. These include a recent infomercial matter in which we charged that the success stories claimed by certain consumers were not factual. When considering consumer testimonials, the Commission also considers whether the testimonial represents that typical consumers may achieve the same result. The Commission has charged in some cases that ads represented that typical consumers could achieve the same result as that obtained by the consumer in the advertisement. Whether a claim of typicality is implied to consumers depends on the particular context of an ad.

In addition, the fact that an endorser is being paid to appear on the program may be a material fact that should be disclosed. For further guidance with respect to endorsements by celebrities, experts, and consumers, you may wish to refer to the Commission's Guidelines Concerning the Use of Endorsements and Testimonials in Advertising.²

All of these various parties may play a greater or a lesser role in the production and dissemination of any particular

²16 C.F.R. Part 255 (1992).

infomercial. This industry, perhaps more than some, has evolved in a manner that consolidates many of these roles under one umbrella. That is, one company may have exclusive rights to distribute a product through an infomercial, including creation and production of the commercial, purchase of media time, telephone sales, and order fulfillment. One general principle to keep in mind is that the greater your particular involvement in creating the message conveyed by the infomercial, including drafting copy, hiring actors, conducting demonstrations, etc., the greater your responsibility for ensuring the accuracy of the claims made in the infomercials you produce.

Importance of Self-Regulation

During its early years, the infomercial industry may have suffered some growing pains and a resulting loss of credibility. As the industry has matured, however, we have seen a number of positive steps that would appear to be improving the image of the industry. The self-regulatory efforts of your Association have made significant strides in this respect. The NIMA Marketing Guidelines, for example, if they are followed, can go a long way toward ensuring that infomercials remain within the boundaries of truth and tend to benefit, not deceive, consumers.

I am pleased to note that many of the principles outlined in the Marketing Guidelines have parallels in FTC law. For example, they incorporate aspects of the Commission's substantiation

policy, contain provisions similar to our order requirements pertaining to disclosures of the nature of the program, and otherwise require that claims be truthful. They contain specific guidance with respect to the use of demonstrations, experts, and consumer testimonials. In addition, the Guidelines include provisions relating to the availability and prompt delivery of merchandise, and to the availability of warranties prior to purchase. Because infomercials combine aspects of direct marketing, these parallels to the Commission's rules regarding unavailability, mail order, and warranties, are particularly well-placed in the NIMA guidelines. I encourage you to continue these efforts to promote self-regulation that fully complies with the antitrust laws.

Dedicated self-regulatory efforts minimize the need for Commission action. Your cooperation and understanding of our law enforcement mission is greatly appreciated, and I believe reflects the fact that we all share the same goal -- the protection of truthful advertising without overly burdensome regulation that can chill beneficial information.

Conclusion

Let me conclude by reemphasizing that advertising serves a vital role in our competitive marketplace. Infomercials provide unique tools that, when used properly, can be procompetitive and beneficial to consumers. Our mission at the FTC is to keep the

market free of unfair and deceptive practices so that the wheels of free enterprise roll smoothly and without overly restrictive regulatory tinkering. To ensure an efficient market, it is critically important that we all work together to protect the credibility of advertising, including infomercials. For our part, the Commission will continue to monitor infomercials as part of its ongoing advertising review process. As part of this process, I hope I have made clear that the Commission has not "singled out" your industry for any special scrutiny. Our actions in this area have been novel only in the respect that infomercials themselves are relatively recent in the history of advertising. The principles we apply to infomercials do not differ in any material way from those we apply across-the-board to all advertising media. I look forward to a continued cooperative relationship with associations such as yours, as we jointly strive to maintain truth in advertising, and protect for consumers the creative and beneficial aspects of infomercials.